

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

KEVIN BRIAN DOWLING,

Petitioner,

V.

JEFFREY BEARD, Commissioner,
Pennsylvania Department of
Corrections; LOUIS S. FOLINO,
Superintendent of the State
Correctional Institution at Greene; and
FRANKLIN TENNIS, Superintendent of
the State Correctional Institution
at Rockview,

Respondents.

NO: 3:CV-06-02085

(Judge Caputo)

THIS IS A CAPITAL CASE

MEMORANDUM

Petitioner, Kevin Brian Dowling, a state prisoner sentenced to death following his conviction for first-degree murder and related charges, filed a motion for leave to proceed *in forma pauperis* and for appointment of federal habeas corpus counsel on October 23, 2006. (Doc. 1.) The Court granted the motion on October 24, 2006, and Petitioner was directed to file a petition for writ of habeas corpus on or before April 23, 2007. (Doc. 2.) On January 5, 2007, the Governor of Pennsylvania signed a warrant scheduling Petitioner's execution for February 27, 2007. (See Doc. 4.) Consequently, Petitioner filed a motion for a stay of execution (Doc. 5), which the Court granted by Order dated January 12, 2007. (Doc. 6.) Before his habeas petition was due to the Court, Petitioner requested three extensions of time in which to file the petition (Docs. 9, 12 & 14), which the Court granted on April 16, June 12, and July 23, 2007, respectively. (Docs. 11, 13 & 16.) Thereafter, on July 24, 2007, Petitioner timely filed

his habeas petition. (Doc. 18.) Pending before the Court are Petitioner's motions to stay the federal proceedings to permit Petitioner's counsel to forthwith exhaust his claims in state court. (Docs. 19 & 23.) In his motions, Petitioner contends that he has not exhausted state remedies for some of the claims raised in the habeas petition before the Court. In order to properly exhaust those remedies, Petitioner informs the Court that on July 31, 2007, he filed an amended petition for writ of habeas corpus and for collateral relief from criminal conviction pursuant to the PCRA in the Court of Common Pleas of York County. (Doc. 23 at 3-4.) Proceedings in that court remain pending.

The United States Court of Appeals for the Third Circuit has held that "district courts have the discretion to stay mixed habeas corpus petitions but that . . . when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action." *Crews v. Horn*, 360 F.3d 146, 154 (3d Cir. 2004). The Court added that in such cases, "all of the petitioner's claims should be stayed, and any claims that remain unexhausted after the petitioner returns to federal court should be dismissed at that juncture." *Id.* at 154 n.5. When a petition for writ of habeas corpus is stayed, the court must give a petitioner a reasonable interval, usually thirty (30) days, to file his application for state post-conviction relief and another reasonable interval after the denial of that relief to return to federal court. *Id.* at 154. The Third Circuit's discretion that a stay be entered to avoid statute of limitations issues will be followed here.

An appropriate order follows.

Date: September 11, 2007

s/ A. Richard Caputo
United States District Judge

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ORDER

AND NOW, this 11th day of September, 2007, it is hereby **ORDERED** that:

1. Petitioner's motion to stay the federal proceedings (Doc. 19) is **GRANTED**. Litigation in this habeas corpus proceeding is **STAYED** pending exhaustion of state court remedies of any unexhausted claims.
2. The stay of execution issued by the Court in the Order dated January 12, 2007 (Doc. 6) shall **REMAIN IN EFFECT**.
3. Petitioner shall have thirty (30) days to file his application for state post-conviction relief, if he has not already done so.
4. If Petitioner is denied state post-conviction relief, either party shall notify the Court within thirty (30) days from the time of final denial and request that the stay of litigation be vacated.

s/ A. Richard Caputo
United States District Judge